IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL ST.NO.20916 OF 2006

Smt.Jaibunnisa Anwar Choudhary
A-3, Room No.8, Parksite Colony,
Vikhroli, Bombay 400 079 ...Appellant

vs.

Bombay Municipal Corporation
Mahapalika Bhavan,
Mahapalika Marg, Fort,
Bombay 400 001.

Shri Ahmed Ullah Khan
A-3, Room No.8, Parksite Colony,
Vikhroli, Bombay 400 079 ...Respondents

Mr.J.S.Kini with Ms Kinjal Haria for the Appellant
Mr.V.S.Kapse for Respondent No.2

CORAM: A.S.OKA,J.
DATE ON WHICH ARGUMENTS WERE HEARD:1ST OCTOBER 2007
DATE OF PRONOUNCE OF THE JUDGMENT :1ST NOVEMBER 2007.

JUDGMENT:

1. By this First appeal the Appellant-orginal Plaintiff has taken an exception to the orders dated 23rd July 2001 and 7th September 2001 passed by the learned Judge of the City Civil Court. By order dated 23rd July 2001, a suit filed by the Appellant was dismissed and by order dated 7th September 2001, a notice of motion taken out by the Appellant for restoration of the suit has been dismissed.

2. On 23rd July 2001, when the suit filed by the Appellant was fixed for recording of evidence, the plaintiff-Appellant, his witness and his Advocate were absent. Therefore, the suit

was dismissed for default. Thereafter, a notice of motion being Notice of Motion No.3166 of 2001 was taken out by the plaintiff for restoration of the suit. By order dated 7th September 2001, the notice of motion was dismissed on the ground that the same was not maintainable. The Trial court held that remedy of Appellant-plaintiff was to file a Revision Application under section 115 of the Code of Civil Procedure,1908 (hereinafter referred to as the said Code). Even on merits, the learned trial judge observed that the Appellant was negligent in prosecuting the suit. It appears that the Appellant filed a Civil Revision Application being Civil Revision Application No.63 of 2002 in this court for challenging the orders which are impugned in this Appeal. By order dated 30th October 2002, the Revision Application was allowed to be withdrawn with liberty to file appropriate proceeding. The Advocate for the Appellant prayed for withdrawal of the Revision Application in view of objection raised by the second Respondent as regards maintainability of the revision Application. Thereafter, the Appellant filed Writ petition No.6121 of 2003 under Article 227 of the Constitution of India. The said Writ petition was disposed of by order dated 19th December 2005 by observing that the impugned order was appealable as the Notice of Motion taken out by the Appellant was under Order IX of Rule 9 of the said Code.

3. The learned counsel for the Appellant submitted that the Appellant has filed the present Appeal against the order dismissing the Notice of motion as well as against the main order dismissing the suit. He submitted that while dismissing the Writ petition filed by the Appellant, this court has observed that an Appeal will lie against the order passed on the notice of Motion. He pointed out that as the suit has been dismissed, the First Appeal is maintainable against the Judgment and order passed in the First Appeal.

4. The learned counsel for the second Respondent submitted that the order dismissing the suit is not a decree and therefore, the first Appeal is not maintainable. He submitted that as the notice of motion taken out by the Appellant before the trial court was not maintainable, even the Appeal from Order was not maintainable against the order passed on Notice of Motion. He, therefore, submitted that the Appeal deserves to be dismissed as not maintainable.

5. I have carefully considered the submissions. I have perused the order dated 23rd July 2001 passed by the Trial Court in the suit. The suit has been dismissed for default on the ground that the plaintiff, his Advocate as well as his witness were absent. The Court observed that the suit is dismissed in view of the fact that the plaintiff has failed to lead further evidence. Perusal of the said order shows that

the same is not passed on merits deciding the rights between the parties and the suit is dismissed for default. As there is no adjudication of the rights between the parties, the said order is not a decree within the meaning of section 2(2) of the said Code. Therefore, the present Appeal invoking section 96 of the said Code is not maintainable as an Appeal under section 96 is maintainable only against a decree within the meaning of section 2(2) of the said Code. Perusal of the section 104 or Order XLIII of the said Code shows that an Appeal from Order is not maintainable against the order dated 23rd July 2001 passed on the suit.

6. Perusal of the order dismissing the suit shows that on that day the suit was fixed for recording of evidence. The Appellant and his Advocate were absent. The order shows that the trial court exercised powers under Rule 2 of Order XVII read with Rule 8 of Order IX of the said Code while dismissing the suit. It is, therefore, obvious that the notice of motion taken out by the Appellant-Plaintiff was for invoking power under Rule 9 of Order IX of the said Code and that is precisely the observation made by this court in order dated 19th December 2005 in Writ Petition No.6121 of 2003.

7. It is, thus, obvious that the order passed on the notice of motion is an appealable order under clause (c) of Rule 1 of Order XLIII of the said Code.

8. Hence, a First Appeal under section 96 of the said Code is not maintainable against the order dated 23rd July 2001 dismissing the suit for default. However, an Appeal from Order is maintainable for challenging the order dated 7th September 2001.

9. Accordingly, First Appeal is not maintainable and the same is dismissed only on the ground that it is not maintainable. This order will not preclude the Appellant from preferring an Appeal from Order for challenging the order dated 17th September 2001 passed in the notice of motion.

JUDGE